Federal Court  Cour fédérale

Date: 20210622

Docket: T-1346-19

Citation: 2021 FC 646

Ottawa, Ontario, June 22, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ANTONIO DA SILVA

Applicant

and

THE MINISTER OF NATIONAL REVENUE

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the denial of Mr. Da Silva's request that the arrears of interest incurred from 2008-2018 on his outstanding tax debts for the 2002-2007 taxation years, be waived or cancelled.

[2] Such relief is made possible under subsection 220(3.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp), which provides as follows:

The Minister may, on or before the day that is ten calendar years after the end of a taxation year of a taxpayer (or in the case of a partnership, a fiscal period of the partnership) or on application by the taxpayer or partnership on or before that day, waive or cancel all or any portion of any penalty or interest otherwise payable under this Act by the taxpayer or partnership in respect of that taxation year or fiscal period, and notwithstanding subsections 152(4) to (5), any assessment of the interest and penalties payable by the taxpayer or partnership shall be made that is necessary to take into account the cancellation of the penalty or interest.	Le ministre peut, au plus tard le jour qui suit de dix années civiles la fin de l'année d'imposition d'un contribuable ou de l'exercice d'une société de personnes ou sur demande du contribuable ou de la société de personnes faite au plus tard ce jour-là, renoncer à tout ou partie d'un montant de pénalité ou d'intérêts payable par ailleurs par le contribuable ou la société de personnes en application de la présente loi pour cette année d'imposition ou cet exercice, ou l'annuler en tout ou en partie. Malgré les paragraphes 152(4) à (5), le ministre établit les cotisations voulues concernant les intérêts et pénalités payables par le contribuable ou la société de personnes pour tenir compte de pareille annulation.

[3] Mr. Da Silva's initial request for relief was made on April 12, 2018. It was refused. As permitted under the relevant provisions, he asked the Minister to reconsider that decision. The decision on second review, dated July 23, 2019, was also denied. It is that decision that is being reviewed in this Court.

[4] In 2009, an audit of Mr. Da Silva's income resulted in a reassessment for the 2002 through 2007 taxation years to include $874,402 of omitted income, as well as gross negligence penalties. Between June 2009 and October 2018, Mr. Da Silva made nine voluntary payments towards his debt and internal transfers and garnishments were also applied to his debt. As at

May 15, 2019, he owed $1,161,010.14. This was comprised of interest in relation to the 2002 taxation year, and taxes, penalties and interest in relation to the 2003 through 2007, 2014, and 2016 taxation years. It appears from the record that approximately $632,120.26 of the total debt relates to interest charged on unpaid taxes.

[5] The second request to waive or cancel the interest charges, like the first, was made on the basis of financial hardship/inability to pay, and serious illness; however as his business in Churchill, Manitoba, had been closed due to a fire, the request was also based on natural or human made disaster.

[6] The leading authority on the proper interpretation of subsection 220(3.1) of the Act is *Bozzer v Canada (Minister of National Revenue)*, 2011 FCA 186. The Federal Court of Appeal held that this provision "permits the Minister to exercise his discretion to cancel interest in any taxation year ending within the ten years before the taxpayer's application for relief, regardless of when the underlying tax debt arose." In the case at bar, this means that the Minister could grant relief for interest accrued since January 1, 2008. That is not in dispute between these parties.

[7] Mr. Da Silva submits that "if the applicable ten-year period to consider a taxpayer interest relief request is ten years prior to when the request was made, then the circumstances of that same ten year period in which the interest on the tax liability accrued should form the basis for consideration of the request." In short, he submits that the relevant facts are those that arose or occurred in the 2008-2018 period and not those before 2008. He submits that the decision

under review considered facts before 2008, and placed an emphasis on them, making the decision unreasonable.

[8] In support of this submission, his counsel specifically directed the Court's attention to the following passages of the decision:

> You requested relief of arrears [of] interest for tax years prior to 2008. The Canada Revenue Agency (CRA) can consider relief of interest for any tax year. However, consideration is limited to interest that accrued in the 10 calendar years prior to the year the first request was made, which was April 12, 2018. Therefore, this decision is for interest accrued since January 1, 2008.
>
> Relief was requested due to your medical conditions, which included hypertension, strokes and heart conditions. The medical information provided are for conditions that occurred after the filing and payment due dates of the tax years involved in the relief request, except for the hypertension diagnosis in 2004. The medical information provided did not demonstrate that you are prevented from meeting your tax obligations due to these conditions. The review did find you may have been unable to address your tax issues as of August 2017, when you suffered from a stroke and showed episodes of confusion, disorientation, lapses in memory consistent with seizure episodes. However, at this time, you appointed your daughter and wife as powers of attorney. It is important to note the voluntary payments were paid towards the debt after August 2017; therefore, I have not determined your medical conditions prevented payments from being made towards your debt.
>
> In your relief request it refers to the fire at your business. As a result of that fire, your business was a total loss therefore, you no longer have an ongoing source of income. As the fire occurred in the spring of 2018, I have not determined this affected your ability to meet your tax obligations for the 2002 to 2007 tax years when they were due; however, I have taken into consideration the effect of the fire on your ability to earn an income and have included this in reviewing your request for relief due to financial hardship and for an inability to pay.
>
> [emphasis added]

[9] Mr. Da Silva correctly observes in his memorandum at paragraph 12 that "Subsection 220(3.1) does not include language which qualifies the scope of the CRA's discretion in making a decision to waive or cancel all or any portion of any penalty or interest other than the stipulation of a ten calendar-year limitation period." He submits that "Where the CRA did not take into consideration any of the applicant's circumstances during the period encompassed by the Second Level Taxpayer Relief Request, being 2008 to 2018, the CRA's decision was unreasonable [emphasis added]."

[10] It is evident from the reasons given by the decision-maker, that the applicant's circumstances between 2008 and 2018, were considered. A review of the wording of the second part of the second paragraph reproduced at paragraph 8 above indicates this. The decision-maker considered Mr. Da Silva's medical condition on and around 2017, in addition to other earlier evidence.

[11] In counsel's oral submissions, he appeared to resile from this position. He took the position that the decision-maker unduly focused on evidence prior to 2008, and submitted that this made the decision unreasonable. I am not able to agree with either submission.

[12] In my assessment, the decision-maker considered all of the evidence before her that may have affected the ability of Mr. Da Silva to pay the accrued interest. She did so whether that occurred prior to 2008 or subsequently. I see no error in that approach.

[13] As noted earlier, the interest was accruing on a tax debt that related to taxation years 2002 to 2007. There is no restriction on the matters a decision-maker may consider when assessing whether to waive or cancel interest penalties. Events at the time the initial debt was incurred are, in my view, relevant to such an examination.

[14] Consider this example. A taxpayer omits declaring $500,000 of income in the years 2005-2010. This is discovered on a reassessment in 2011, and he is assessed the additional tax, penalties, and interest on the unpaid amounts. He pays nothing towards the interest component but continues to earn a substantial income which he invests badly. In 2020, he suffers a debilitating injury and is virtually incapacitated. He asks the Minister to cancel or waive the interest arrears. While he may now be unable to earn an income such that he can quickly and fully pay the arrears, is it not relevant whether in prior years that was also the case? In the example given, there was nothing preventing him from retiring the debt of interest arrears; he simply chose not to do so. In my view, that is a relevant consideration. That is not to suggest that the taxpayer's current circumstances are irrelevant. But it is to say, that all of his circumstances are relevant to the matter under consideration.

[15] Mr. Da Silva submits that if the Minister was entitled to consider his circumstances going back to 2002, then the Minister ignored the evidence that he suffered from a serious illness during the period 2002 to 2007. With respect, I am unable to conclude that any evidence was submitted to establish any medical conditions that significantly impacted or impaired him from 2002 to 2007. What scant evidence there is in the record was, in fact, considered by the decision-maker.

[16] Lastly, Mr. Da Silva submits that the Minister failed to consider the unfairness inherent in the inordinate and disproportionate amount of interest in comparison to the underlying tax debt. He points out that as at the date of the second request, the debt was comprised of $482,123.14 of actual tax, and $632,120.26 of interest. He says:

> The sheer magnitude of interest in proportion to the underlying tax is inherently unfair and warrants relief under the fairness provisions. In [*Dick v Canada (Customs and Revenue Agency)*, 2005 FC 560, paragraph 9], this Court set aside a decision of this Minister to deny taxpayer relief on the basis that the Minister had erred in failing to consider, *inter alia*, the excessive proportion of penalty and interest in comparison to the underlying tax.

[17] I agree with the Minister that this authority is distinguishable from the case at bar. Mr. Dick had demonstrated financial hardship and was unlikely to ever be in a position to repay the amounts owed. The proportion of the interest component was only one of the factors this Court found to be relevant and not considered. Specifically, at paragraphs 9 to 11, the Court found that the provisions of section 7(b) of the Fairness Package applied to Mr. Dick's circumstances:

> … I note that the CCRA did not take into consideration:
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> i) the fact that the Applicant is 72 years old and, given his chronic alcoholism and substance abuse, is unlikely to ever earn the amounts owed;
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> ii) the penalty and interest owing far exceed the tax owing;
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> iii) the Applicant at the hearing advised that he could borrow the money from a personal friend to pay the taxes owing, if penalty and interest were waived; and
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> iv) section 7(b) of the Fairness Package.
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> Section 7(b) of the Fairness Package provides:
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> > When a taxpayer is unable to conclude a reasonable payment arrangement because the interest charges absorb a significant portion of the payments. In

> such a case, consideration may be given to waiving interest in all or in part for the period from when payments commence until the amounts owing are paid provided the agreed payments are made on time.
>
> These provisions seem to be directly applicable to this case. I find it was patently unreasonable for the CCRA not to take the four factors, mentioned in paragraph 9 above, into account. Evidently, the CCRA could make any relief based on s. 7(b) of the Fairness Package contingent on the tax debt being paid contemporaneous with the penalty and interest relief granted. [emphasis added]

[18] The proportion of interest accrued to the underlying tax debt is not a stand alone consideration.

[19] Unlike Mr. Dick's circumstances, here the decision-maker found that Mr. Da Silva had sufficient assets to rearrange his financial affairs. The record before her showed that he had assets valued at over $415,000.00, with a mortgage liability of $48,121.99 on a primary residence valued at $375,000.00. Moreover, he was due to receive an insurance payment as a result of the fire at his business of $541,000.00;

[20] For these reasons, the application must be dismissed.

[21] In keeping with the Court's Practice Direction on costs in the Federal Court, dated April 30, 2010, the parties were asked to make submissions on costs. They are agreed that the successful party should be awarded its costs, fixed at $1,500.00. I agree.

JUDGMENT IN T-1346-19

THIS COURT'S JUDGMENT is that this application is dismissed, with costs to the Respondent, fixed at $1,500.00.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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